No. 14,741

In the

United States Court of Appeals

For the Ninth Circuit

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Plaintiff-Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant-Appellee.

Appellant's Opening Brief

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Appellant's Opening Brief

This is an action brought by an assignee of a foreign creditor of a decedent seeking to impress a constructive trust upon certain assets of the decedent in the possession of the defendant. The District Court found that there was no basis in law or in fact for directing the establishment of the constructive trust and entered a judgment dismissing the complaint. This appeal is from that decision.

JURISDICTION

Jurisdiction of the District Court is based upon U. S. Code, Title 28, Section 1332, there being diversity of citizenship and requisite amount in controversy (Complaint, Para-

graph 1, R. 3; Findings 1, 2 and 3, Rec. 22). Jurisdiction of this Court over the appeal is based upon U. S. Code, Title 28, Section 1291, the judgment under review being a final decision of a District Court of the United States.

STATEMENT OF THE CASE

This appeal involves the right of a foreign creditor of a decedent to impress a constructive trust upon assets of the decedent in the hands of the administratrix of his estate, who was also an heir and a creditor of the decedent, where the administratrix-heir-creditor probated the estate in a county other than the county in which the decedent resided at the date of his death.

Questions Presented

1. Was the debtor, Edward Cebrian, a resident of the County of Los Angeles or a resident of the City and County of San Francisco on June 6, 1944, the date of his death?

2. If Edward Cebrian was a resident of Los Angeles County on the date of his death, was the action of an administratrix, who was also an heir and creditor of the decedent, in probating the estate of Edward Cebrian in San Francisco and in obtaining the assets of the estate of Edward Cebrian, deceased, without payment of a debt due to a foreign creditor, actual or constructive fraud?

3. If Edward Cebrian was a resident of the City and County of San Francisco on the date of his death, was the action of said administratrix in informing the local registrar that the usual residence of Edward Cebrian was in Los Angeles; in filing with the County Clerk her sworn statement that it was true of her own knowledge that Edward was a resident of Los Angeles County at the date of his death; and in failing to correct said public records actual or constructive fraud?

4. If the answer to either of questions 2 or 3 is in the affirmative, does a court in equity have the power on the instant record to impress a constructive trust and to decree that restitution be made to the creditor of the amount of the debt of the decedent?

5. Does a note which provides for interest "at the rate of six percent per annum from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full" provide for simple interest, or for compound interest?

These questions are raised on the law and on the facts pointed out below in this brief.

The Pleadings

This cause was tried upon a complaint filed by Charles J. Colville (R. 3-8). During the course of the litigation, Charles Colville died and his widow and executrix, Wilma Urch Colville, was substituted as party plaintiff (Finding 1, R. 22).

The complaint alleges that plaintiff is the owner of a certain promissory note executed by one Edward Cebrian, now deceased; that Edward Cebrian, on the date of his death, owed the principal and interest on said promissory note; that Edward Cebrian was a resident of Los Angeles County when he died; that defendant wrongfully probated the estate of Edward Cebrian in the City and County of San Francisco; that the estate should have been probated in Los Angeles County; that plaintiff and his predecessors were deprived of their right to file claims in the proper administration of the estate, i.e., Los Angeles County; and that the acts of concealment and intermeddling pleaded in the complaint were not discovered by the creditor until after May 20, 1950 (R. 3-7).

The complaint asks for judgment against defendant, both individually and in her representative capacity, for the principal of the note and for interest compounded semi-annually (R. 7). A copy of the note is attached to the complaint (R. 7-8).

The answer consists largely of general and specific denials and of affirmative defenses and asks that the complaint be dismissed (R. 8-20). So far as the issues involved in this appeal are concerned, the answer denies that defendant wrongfully probated the estate of Edward Cebrian in San Francisco; alleges that Edward Cebrian was not a resident of Los Angeles County when he died; alleges that plaintiff's claim is barred by his failure to file a claim in the San Francisco probate proceedings; and alleges that plaintiff has no right to impress a constructive trust upon the assets of the estate of Edward Cebrian because of his *laches* (R. 8-20). The pleaded defenses of the statute of limitations and *laches* are not presented for decision on this appeal.

The trial court, by an order for judgment in favor of defendant (R. 21), found for defendant on the issues to be presented by this appeal. The trial court found that defendant "committed no fraud extrinsic in character with respect to the probate proceedings involving the late Edward Cebrian" and that "there is no basis in law or in fact for directing the establishment of a constructive trust." In view of this adjudication, the trial court determined that "there is no occasion to pass upon the applicability of the statute of limitations or the defense of *laches*." (R. 21).

Thereafter the trial court entered findings of fact and conclusions of law (R. 22-31) and final judgment (R. 31-32) accordingly. This appeal followed (R. 32-33).

The Facts

In discussing the facts, we outline primarily those facts as found by the trial court which we do not dispute on this

appeal and which we adopt. We also point out where there are factual disputes and outline the contentions of the parties on these factual disputes. In this Statement of Facts, we discuss the facts chronologically, rather than by subject matter.

In 1928, while in Kentucky, Edward Cebrian, now deceased, made a promissory note (earlier than the one here in dispute) to one John S. Barbee. Barbee, in turn, assigned this note to Van Meter-Terrell Feed Company, a Kentucky corporation, as collateral security for a debt owed by Barbee to said corporation (Finding 6, R. 24).

On November 15, 1932, in renewal of this earlier note (Finding 6, R. 24), Edward Cebrian executed the promissory note in suit—for $10,276.92 plus interest. This note was payable "to the order of John S. Barbee"; was dated at San Francisco; and was negotiable and payable at Lexington, Kentucky (Findings 4 and 5, R. 22-23).

In this note, Edward Cebrian explicitly waived "diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof." (Finding 5, R. 23).

The note provided interest at the rate of 6% per annum "from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full." (Finding 5, R. 23). The question of whether the interest provided by the note is compound interest (Complaint, Prayer for Relief, R. 7) or simple interest was resolved in defendant's favor (Finding 10, R. 25). Plaintiff argues the law on this issue in this brief, pp. 55 to 57.

Edward Cebrian delivered this note to Hugh J. Weldon, an attorney in Santa Barbara who represented John S. Barbee (R. 35-36, Finding 4, R. 22), and Barbee, in turn, delivered the note to Heaney, Price and Postel, also of

Santa Barbara, who were the attorneys for Van Meter-Terrell Feed Company (R. 36; Finding 4, R. 22). When Barbee received this note in November, 1932, he endorsed it in blank and delivered it to Van Meter-Terrell Feed Company (Finding 6, R. 24).

At the time of executing the note, Edward Cebrian was a resident of San Francisco. Edward Cebrian had lived most of his life in the Cebrian family home in San Francisco (Finding 11, R. 25). Edward Cebrian's father, John C. Cebrian, died in 1935 (R. 53) and bequeathed the family home to Ralph Cebrian (R. 53-54), a brother of Edward. Ralph Cebrian, in turn, sold the home to Louis DeL. Cebrian on May 27, 1937 (Plaintiff's Ex. 9, R. 41).

During the period from 1935 to 1938 Edward Cebrian lived at the Cuyama Ranch near Santa Barbara (R. 39, 40, 57, 58, 97 and 98). Thereafter from 1938 to 1944, a period of 6 years, Edward Cebrian lived in Los Angeles (Finding 11, R. 25). While Edward was living at Cuyama Ranch he was a registered voter in Santa Barbara County (Plaintiff's Exhibit 6, R. 38); and while he was living in Los Angeles, he was a registered voter and voted in Los Angeles County (Plaintiff's exhibit 11, R. 42-43).

On or about June 4, 1944, Edward Cebrian died in Los Angeles County (Finding 9, R. 25).

There is a dispute between the parties as to whether Edward Cebrian was a resident of Los Angeles or of San Francisco at the date of his death (Complaint, Paragraph 8, R. 4-5; Answer, Paragraph VIII, R. 11). The trial court did not resolve this fact issue. The evidence bearing on it is discussed in the argument of this brief, pp. 21 to 27.

But whatever might have been his residency, at the date of his death Edward Cebrian still owed the said note dated November 15, 1932, plus interest to John S. Barbee, to Van

Meter-Terrell Feed Company, or to their assignees or successors (Finding 10, R. 25).

On February 9, 1945, eight months after Edward Cebrian's death, defendant executed a petition for probate of the estate of Edward Cebrian for filing in the City and County of San Francisco. This petition alleged that Edward Cebrian died in the County of Los Angeles, but that he was at the time of his death a resident of the City and County of San Francisco (Finding 12, R. 25-26).

On February 9, 1945, also, defendant executed a petition for probate of the estate of Edward Cebrian for filing in the County of Los Angeles. This petition alleged that Edward Cebrian was a resident of the County of Los Angeles at the date of his death (Plaintiff's Ex. 13).

The conflict between the two petitions is illustrated in the side by side comparison of their jurisdictional allegations set forth below:

"* * * Edward Cebrian, also known as Eduardo Cebrian, Edward de Laveaga and Eduardo de Laveaga, died in the County of Los Angeles, State of California, on the 6th day of June, 1944; and was a resident of the said County of Los Angeles, State of California at the time of his death, leaving an estate in said County and elsewhere in the State of California." (Plaintiff's Exhibit 13).

"* * * Edward Cebrian, also known as Eduardo Cebrian and Edward de Laveaga, died in the County of Los Angeles, State of California on the 6th day of June, 1944 and was a resident of the City and County of San Francisco at the time of his d e a t h, leaving an estate in said City and County of San Francisco, State of California." (Plaintiff's Exhibit 21).

In each case, defendant after being sworn said:

"That she is petitioner in the above entitled petition; that she has read the foregoing petition, and knows the

contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information and belief and as to those matters she believes it to be true." (Plaintiff's Exhibits 13 and 21).

And both petitions were "subscribed and sworn to" before the same notary public on the same day, to wit February 9, 1945 (Plaintiff's exhibits 13 and 21).

We note that the jurisdictional allegation is not "therein stated on her information and belief."

On February 10, 1945, defendant caused the San Francisco petition to be filed and on February 11, 1945, she caused the notice of hearing said petition to be given, as provided by Section 441 of the Probate Code (Finding 12, R. 25-26).

On February 20, 1945, after filing the San Francisco petition, defendant filed the Los Angeles petition and caused notice of the hearing of this petition to be given, as provided by Section 441 of the Probate Code (Finding 13, R. 26).

On February 26, 1945, the San Francisco Superior Court determined that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and appointed defendant as his administratrix (Findings 11 and 13, R. 25-27). Defendant then abandoned the Los Angeles proceedings (Finding 13, R. 27).

After obtaining probate of the estate of Edward Cebrian in San Francisco, defendant, on February 26, 1945, caused notice to creditors in the matter of the San Francisco proceedings to be published in *The Recorder,* a San Francisco newspaper, as provided by Section 700 of the Probate Code of California (Finding 17, R. 28).

On May 26, 1945, the three-month period for filing an inventory and appraisement provided by the Probate Code, Section 600, expired.

On June 6, 1945, while the six-months period to file claims against the estate was still running, Baylor Van Meter, the sole owner of the aforementioned Van Meter-Terrell Feed Company, died at Lexington, Kentucky; on June 16, 1945, First National Bank & Trust Company of Lexington, Kentucky, was duly appointed the executor of his estate; and on August 24, 1945, the same company was duly appointed trustee of his estate (Finding 7, R. 24).

On August 26, 1945, the six months period of time in which to file claims expired, and no claim was ever filed or presented on the note in suit (Finding 17, R. 28). Indeed, it is conceded that the only persons who filed claims against the estate were Edward Cebrian's brothers and sisters, including the defendant herein (R. 88, 89, 91-94, and 114-115).

Almost three years after the time for filing claims had expired, defendant, on April 1, 1948, filed the inventory and appraisement of all the assets of the Edward Cebrian estate and accounted for such assets in the probate proceedings pending in the City and County of San Francisco (Finding 15, R. 27; R. 114).

Then, on or about May 24, 1950, the First National Bank & Trust Company of Lexington, Kentucky, delivered said note to Charles J. Colville, the original plaintiff herein, and assigned to the said Charles J. Colville all right, title, claim and interest it held in and to said promissory note as executor or trustee of the estate of Baylor Van Meter, deceased, or as both executor and trustee of said estate (Finding 8, R. 24-25).

Defendant has conceded in open court that there are sufficient assets in the estate with which to pay this promissory

note (Typewritten transcript, p. 175, not printed). The exact language appearing in the record is as follows:

> "Mr. Hoppe: But you have filed a paper, have you not, that there are adequate funds to take care of this judgment in case it is entered and you intend to appeal in case it goes against you?
>
> Mr. Sooy: Yes. I believe that is the fact.
>
> * * * * * * *
>
> The Court: Counsel stated you have filed a paper in the probate proceedings setting forth, in the event of judgment herein, satisfaction would be obtained in a certain fashion.
>
> Mr. Sooy: Yes, Your Honor. I naturally reported on litigation, bankruptcy litigation, and this case, Colville versus Koch, in order to justify partial distribution of the estate, which was made last summer, it used a substantial part of the funds. I have explained the value of Caledonia remaining would be sufficient in event the judgment was rendered."

There is a dispute between the parties concerning the propriety of the dual probate proceedings and the obtaining of letters of administration in San Francisco, as distinguished from Los Angeles. With respect to intent of the defendant and injury to the plaintiff, the District Court drew the following fact conclusions:

> "* * * the allegations in the petition for letters of administration filed February 10, 1945, in the Superior Court in and for the City and County of San Francisco, as to the legal residence of Edward Cebrian at the time of his death were true and correct according to the best information and belief of defendant; * * *" (Finding 15, R. 27);
>
> * * * * * * *
>
> "* * * defendant's only reason for filing said petition in Los Angeles County was to avoid delay in the event the San Francisco Superior Court should decide that

Edward Cebrian was a resident of the County of Los Angeles, rather than of the City and County of San Francisco, as she alleged, and if so, it would necessarily follow that it would have decided it had no jurisdiction to appoint defendant as administratrix. In this event, defendant then could and would have proceeded with the probate proceedings instituted by her in Los Angeles County solely to meet that contingency. * * *" (Finding 13, R. 26-27);

* * * * * * *

"* * * no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian." (Finding 20, R. 28);

* * * * * * *

"At no time subsequent to the death of Edward Cebrian did defendant, as an individual or as administratrix of his estate, intermeddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently;" (Finding 14, R. 27);

* * * * * * *

"* * * at no time subsequent to the death of Edward Cebrian, did defendant conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian; * * *" (Finding 15, R. 27); and

* * * * * * *

"* * * no acts of defendant have deprived plaintiff, or her predecessors, of their right to file claims;". (Finding 16, R. 27-28).

These last conclusionary findings are largely in dispute, either as to their factual basis or as to their legal effect.

The incidental facts essential to a complete understanding of the case are discussed in connection with the particular issues to which they appertain, in the argument appearing in following sections of this brief.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to find that Edward Cebrian, at the time of his death, was a resident of the County of Los Angeles, State of California (Finding 11).

2. The District Court erred in finding that the allegations in the Petition for Letters of Administration filed February 10, 1945, in San Francisco, as to the legal residence of Edward Cebrian at the time of his death "were true and correct according to the best information and belief of defendant" (Finding 15).

3. The District Court erred in finding that defendant's only reason for filing a Petition for Letters of Administration in Los Angeles was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of Los Angeles (Finding 13).

4. The District Court erred in determining that defendant could and would have proceeded with the Los Angeles proceedings 'solely' to meet the contingency set forth in Paragraph 3 above (Finding 13).

5. The District Court erred in finding and/or concluding that the Notice of Hearing in the San Francisco petition given by defendant was in the manner required by law (Finding 12 and Conclusion III).

6. The District Court erred in finding that the plaintiff and her predecessors in interest had constructive notice of the hearings on the defendant's petition for letters of administration in the San Francisco Superior Court (Conclusion II).

7. The District Court erred in finding that defendant committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of

Edward Cebrian either in Los Angeles or San Francisco (Conclusion IV).

8. The District Court erred in finding that defendant did not intermeddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently (Finding 14).

9. The District Court erred in finding that no acts of defendant have deprived plaintiff or her predecessors of their right to file claims (Finding 16).

10. The District Court erred in finding that no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian (Finding 20).

11. The District Court erred in concluding that the exclusive jurisdiction to administer the estate of Edward Cebrian was in the San Francisco Superior Court (Conclusion III).

12. The District Court erred in concluding that any suit or action to recover on the note in suit is forever barred by reason of the failure of the holder of said promissory note to file a creditor's claim in probate therein within six (6) months from the date of the first publication of notice to creditors (Conclusion I).

13. The District Court erred in concluding that plaintiff is not entitled by law or under the evidence adduced under trial of this case to a judgment that defendant is a constructive trustee for plaintiff (Conclusion V).

14. The District Court erred in concluding that defendant is entitled to a judgment that plaintiff take nothing by her complaint (Conclusion VII).

15. The District Court erred in failing to enter judgment for plaintiff in the above-entitled action in accordance with

the prayer of relief and in failing to enter findings of fact and conclusions of law consistent with said Prayer for Judgment.

16. The District Court erred in finding that the note in suit provided for 'simple interest' (Finding 10).

17. The District Court erred in finding that all of the facts alleged in plaintiff's Complaint, inconsistent with findings 1 to 17 were untrue (Finding 18).

18. The District Court erred in finding that all the facts alleged in defendant's Answer not inconsistent with findings 1 to 18 were true (Finding 19).

ARGUMENT

As a preliminary to the Argument, we point out that the equities in this case favor the plaintiff and not defendant. The debt upon which the suit was brought was a valid debt at the date of Edward Cebrian's death. It was due and owing at that time. To permit defendant to retain the property of the decedent free and clear of this debt is to permit unjust enrichment. The District Court was of the same view on the equities, as appears from the following comments made during the oral argument:

> "I think it is a case, frankly, that commends itself to adjustment as between the parties if there were assets in the estate to be subjected to matters of claim." (Typed record 248).

It is only because the District Court thought that it lacked the power to grant relief that this matter is here on appeal. The District Court's conviction that it lacked judicial power to grant relief, absent extrinsic fraud, is illustrated by the following remarks addressed to counsel for plaintiff during the course of argument:

> "* * * You will have to admit and concede, I take it, that any matters involved in the proceedings before

> Judge Fitzpatrick and inherent in those proceedings are foreclosed from consideration on my part. * * * What I say from my view in judging the matter and in the light of the law that is Hornbook, you must concede that I am foreclosed unless you can show fraud extrinsic in character. * * * If you dissuade me, I will be promptly reversed by the Court of Appeals. * * * What possible security would there be in a decision of a probate court if I could re-examine at this late date matters that were inherent in that record?" (Typed record, pp. 220-221).

That this was the basis for the result in this case appears from the Order for judgment in favor of defendant, where the Court found (R. 21):

> "* * * defendant * * * committed no fraud extrinsic in character with respect to the probate proceedings * * * and * * * there is no basis in law or in fact for directing the establishment of a constructive trust * * *."

With this preface, we turn to the record and to the law and demonstrate that plaintiff is entitled, both by law and under the evidence, to a judgment that the defendant is a constructive trustee for the plaintiff.

Summary of Argument

I. Edward Cebrian was a resident of Los Angeles County at the time of his death. During the six years he lived there, he proclaimed his Los Angeles residence to his landlady and to the election officials under oath; he voted there; he kept his only personal possessions including family paintings there; and he had no other abode. The contrary evidence at most amounted to proof of a floating intention or desire some day to return to San Francisco to live there and to make it his residence.

Government Code, Section 244;
Bullis v. Staniford (1918), 178 Cal. 40, 46;
Estate of Brady (1918), 177 Cal. 537, 540;
Taff v. Goodman (1940), 41 C.A.2d 771, 775;
Estate of Weed (1898), 120 Cal. 634; and
Estate of Margaret Austin (1879), Myrick, p. 237.

II. By statute, the Cebrian estate should have been probated in the County of Los Angeles. The probate code provides that letters of administration must be granted and administration of estates of decedents must be had in the superior court of the county of which the decedent was a resident at the time of his death, wherever he may have died.

Probate Code, Section 301.

III. An order of the Superior Court granting letters is a conclusive determination of the jurisdiction of the court when it becomes final; and it cannot be collaterally attacked in the absence of fraud in its procurement.

Probate Code, Section 302;
Irwin v. Scriber (1861), 18 Cal. 499, 504;
In re Griffith (1890), 84 Cal. 107;
Holabird v. Superior Court (1929), 101 Cal. App. 49;
Estate of Robinson (1942), 19 Cal. 2d 534; and
Estate of Crisler (1948), 83 C.A.2d 431.

But a suit to review a judgment for fraud or mistake is a direct proceeding against such judgment and not a collateral attack.

Bacon v. Bacon (1907), 150 Cal. 477, 486; and
Caldwell v. Taylor (1933), 218 Cal. 471, 475.

IV. Equity has power to grant relief from a probate judgment wrongfully obtained and to deprive a party of the benefit of the wrongfully obtained judgment.

Civil Code, Section 2224;

Patterson et al v. Dickinson et al. (C.C.A. 9, 1912), 193 Fed. 328, 333;

Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717;

Diamond v. Connolly (C.C.A. 9, 1918), 251 Fed. 234, 240-241;

Arrowsmith v. Gleason (1889), 129 U.S. 86, 101;

Estate of Hudson (1883), 63 Cal. 454, 457;

Comment on *Fraud: Relief in Equity Against Judgments Obtained by Fraud* (1920-1921), 9 Cal. Law Review 156;

Comment on *Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud* (1934-1935), 23 Cal. Law Review 79; and

Cases cited at page 32 of the argument.

V. A fraudulent intent is not an essential element to impress a constructive trust under the "extrinsic fraud" rule.

Diamond v. Connolly (C.C.A. 9, 1921), 276 Fed. 87, 91, 92; and

Cardozo v. Bank of America (1953), 116 C.A.2d 833, 837.

VI. One element warranting relief is that defendant was a fiduciary for the creditors of the decedent as well as for his heirs.

Curtis v. Schell (1900), 129 Cal. 208, 215;

Magraw v. McGlynn (1864), 26 Cal. 420, 429;

Ex parte Smith (1878), 53 Cal. 204, 208; and

Estate of Palm (1945), 68 C.A.2d 204, 211.

As a fiduciary, defendant had the duty to make a full disclosure to the superior court of all the evidence upon which the determination of residency should have been made. She did not do so. Her failure to do so is a fraud for which equity may afford relief whether such fraud be regarded as extrinsic or, as an exception to the extrinsic fraud rule.

Probate Code, Section 1233;
Penal Code, Section 125;
Civil Code, Section 2228;
Civil Code, Section 2234;
Laun v. Kipp (1914), 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655, 670;
Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717, 718;
Larrabee v. Tracy (1943), 21 C.2d 645, 651;
Wellman v. Security-First Nat. Bank (1951), 108 C.A. 2d 254, 267;
Sohler v. Sohler (1902), 135 Cal. 323, 327; and
Freeman on Judgments, Section 1235, Vol. 3, pp. 2575-2577.

VII. A further extrinsic factor is that the erroneous testimony of defendant concealed from the Superior Court facts affecting its own jurisdiction. The concealment of jurisdictional facts is a fraud on the court.

Miller v. Higgins (1910), 14 C.A. 156, 162;
McGuinness v. Superior Court (1925), 196 Cal. 222, 226;
State ex rel. Sparrenberger v. District Court (1923), 66 Mont. 496, 214 Pac. 85, 33 A.L.R. 464, 466; and
Crow v. Crow (1914), 74 Okla. 455, 139 Pac. 122.

VIII. Another extrinsic factor is that the proceedings to determine jurisdiction were *ex parte* and there was no adversary trial or decision on the issue of residence.

Wolfsen v. Smyth (C.A. 9, 1955), 223 F.2d 111, 113;
Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 718;
Kasparian v. Kasparian (1933), 132 Cal. App. 773, 781-782;
Bacon v. Bacon (1907), 150 Cal. 477, 492;
Curtis v. Schell (1900), 129 Cal. 208, 215; and
Dunlap v. Steere (1891), 92 Cal. 344, 348.

IX. Still another extrinsic factor is that abundant public records in Los Angeles County proclaimed that Edward Cebrian was a resident of Los Angeles County. As a result, the San Francisco proceedings were contrary to a logical conclusion to be drawn from the information given by these public records.

Adams v. Hackensack Trust Co. (1945), 156 Fla. 20, 22 So. 2d 392, 395-396; and
Monk v. Morgan (1920), 49 Cal. App. 154.

X. The Caledonia Farms arrangement was an additional extrinsic factor. Under this arrangement, Edward Cebrian was a secret beneficiary of a trust of valuable farm lands once owned by him. This arrangement was consummated in 1935 and was not made a matter of public record any place until 1948, long after creditors would have had any interest in any probate proceedings. In the interim in 1935 and again in 1938, plaintiff's precedessor had unsuccessfully sought to locate assets belonging to Edward Cebrian. If these assets had been openly avowed, it is manifest that all creditors of Edward Cebrian would have watched his status carefully.

XI. The defense that plaintiff had constructive notice of the San Francisco proceedings is unsound on three separate bases.

First, constructive notice is no defense in an equitable action of this type, particularly where the only notice is by newspaper publication.

Bergin v. Haight (1893), 99 Cal. 52, 56; and
Dunlap v. Steere (1891), 92 Cal. 344, 349.

Second, plaintiff was not bound to know anything of the San Francisco proceedings because the facts giving jurisdiction did not exist.

Beckett v. Selover (1857), 7 Cal. 215, 236-237.

Third, plaintiff's predecessor was a resident of Kentucky at the time the notices to creditors were published. As a matter of law, there was no constructive notice of the proceedings.

Sterling v. Title Ins. & Trust Co. (1942), 53 C.A. 2d 736, 749; and
Civil Code, section 3530.

XII. The law will presume a causal relationship between the wrongful probate of the estate in San Francisco and the failure of the creditor to file a claim. Indeed, even in the absence of such a presumption, it is not necessary for a plaintiff to show he has sustained any loss by reason of the wrongful conduct of a fiduciary.

Probate Code, Section 301(1);
Probate Code, Section 700;
Probate Code, Section 701;
Code of Civil Procedure, Section 1963, para. 4;
Beckett v. Selover (1857), 7 Cal. 215, 237;
United States v. Carter (1910), 217 U.S. 286, 305;
Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717.

XIII. The failure of plaintiff to file a claim does not bar the action. This failure did not operate as an extinguishment of the debt and a court is still free to award equitable relief.

Stanley et al v. Westover (1928) 93 Cal. App. 97, 110; and

Adams v. Hackensack Trust Co. (1945) 156 Fla. 20, 22 So. 2d 392.

Cf. *Sterling v. Title Ins. & Trust Co.* (1942) 53 C.A. 2d 736, 749.

XIV. The note in suit provides that interest is payable at maturity and thereafter semi-annually until paid in full. This language manifested an express intent to provide for compound interest.

Ashford v. Traylor (1931) 43 Ga. App. 507, 159 S.E. 777; 33 C.J. 207, *Interest,* Section 66, Note 84; and 47 C.J.S. 26, *Interest,* Section 15, Note 16.

XV. The findings of fact do not warrant a deviation from the foregoing rules of law and may be permitted to stand. But even if they did support a contrary conclusion, the disputed findings of fact are clearly erroneous because they are without record support. And, findings 18 and 19 do not support this judgment. Because of their generality they do not comply with Rule 52 of the Rules of Civil Procedure.

XVI. Plaintiff asks that the judgment of the District Court be reversed with instructions to consider the applicability of the statute of limitations and the defense of laches and to enter judgment for plaintiff in the event the District Court determines that defendant has not sustained said defenses.

So much of the statutes and rules cited in the argument as may be deemed necessary to the decision of the case is printed at length in an appendix accompanying this brief.

Edward Cebrian Was a Resident of Los Angeles

A crucial fact question on this appeal is whether Edward Cebrian, at the time of his death, was a resident of Los

Angeles County, or, a resident of the City and County of San Francisco. Plaintiff submits that she was entitled to a finding in her favor on this issue. The trial court failed to resolve this fact issue. Our first specification asserts error in failing to find that Edward Cebrian was a resident of Los Angeles County at the date of his death.

The evidence on this question is not in substantial conflict and we believe that it clearly establishes the Los Angeles residency which we urge. We concede that Edward Cebrian once was a resident of San Francisco and that this status continued until some time in 1934. Up to that time, Edward Cebrian apparently considered the old family homestead at 1801 Octavia Street to be his residence. This brief, therefore, discusses the occurrences taking place subsequent to that date to show that a change in residency in fact occurred.

In 1934, Edward Cebrian was the owner of a 44,000-acre ranch in the counties of San Luis Obispo and Santa Barbara. This ranch is called Rancho Cuyama. In 1934, Rancho Cuyama was subject to a $450,000.00 mortgage, which was then in default (R. 57, 58, and 97).

On August 21, 1934, Edward Cebrian filed proceedings in Los Angeles for a composition or extension of creditors under the then Sections 75a to r of the Federal Bankruptcy Act (R. 90).

On January 17, 1935, said proceedings were dismissed (R. 91) and Edward obtained a three-year lease of Rancho Cuyama with an option to purchase it from the bank (R. 58). Edward Cebrian, together with the defendant in this action and Edwin Koch, her husband, moved to Rancho Cuyama (R. 39, and 97).

Edward lived at Rancho Cuyama under the lease from 1935 to 1938 (R. 39). In 1938, Edward lost his rights in Cuyama Ranch (R. 59). Edward then moved to Los Angeles

and stayed in Los Angeles until the date of his death on June 6, 1944 (R. 40, 41, and 42).

While Edward was living at Rancho Cuyama, his father, John C. Cebrian, died in Madrid, Spain, in the year 1935 (R. 53). Edward's mother already was dead, having died in 1920 (R. 52).

As a part of the settlement of his father's estate, Edward received two of the paintings which the family had considered to be old masters (R. 50, 68, 69) and nothing more.

John Cebrian bequeathed the family homestead to Ralph Cebrian (R. 53-54) and Ralph thereafter referred to the homestead as "my residence." (R. 66).

Also, while Edward was living at Rancho Cuyama, Ralph Cebrian, in 1935, closed up an office which Edward and Ralph had maintained in San Francisco for many, many years (R. 57, 65, 66).

Thus by 1936, the family homestead had been transferred from father to brother and the San Francisco office had become a thing of the past. Edward then, on July 13, 1936, became a registered voter on the Great Register of Santa Barbara County (Plaintiff's Ex. 6, R. 38). We can infer that Edward Cebrian did not make this step thoughtlessly, for earlier, in 1930, when San Francisco had indisputably been Edward's residence, he insisted that he be included in the census in this city, although he was then located in Kentucky (R. 65).

For a period of time after the death of John Cebrian, Ralph Cebrian retained the old family home. During this period, Edward continued to maintain three rooms under lock and key in which he stored his photographic equipment and in which he stored records which had been removed from the old office (R. 53, 66, 85). During this period also, while Edward was staying at the Palace Hotel, he would

have his personal laundry done at the Octavia Street home (R. 81-82).

Then Ralph Cebrian transferred the home to Luis DeL. Cebrian in satisfaction of a debt (R. 54). Although Ralph Cebrian's oral testimony placed this date as March 19, 1938 (R. 54), the contemporaneous documentary evidence shows that the deed was dated May 17, 1937 (Plaintiff's Ex. 9, R. 41).

After Ralph disposed of the old homestead, Edward went through the home and removed his personal belongings (R. 55, 85) and Ralph destroyed the old office files (R. 66). This destroyed Edward's last physical tie to San Francisco.

During the years from 1935-1938 Edward made many "business trips" trying to build up a business to save the ranch (R. 97-98). On some of these trips Edward came to San Francisco, where he stayed at the Palace Hotel (R. 55, 99).

Edward then lost all hope of retaining the ranch and left it in March or April of 1938 (R. 98). After Edward left, Hibernia Bank put some tenants in on a share basis and defendant and Mr. Koch stayed on until November to look after the interests of the bank (R. 98).

Edward, however, was still interested in saving the ranch and tried to interest people in buying it. He went to Los Angeles, Santa Barbara and San Francisco (R. 98). As pointed out, he stayed at the Palace Hotel when he was in San Francisco on these trips.

It does not appear that Edward Cebrian ever maintained a permanent room at the Palace Hotel or that he ever considered the hotel to be his residence.

The last time Edward was seen in San Francisco was in the fall of 1938. Ralph Cebrian saw him on the street (R. 55) at which time Edward complained that "our sister Isabelle wanted him to move down to Los Angeles" (R. 56).

Edward said he would like to remain in San Francisco (R. 56), but Isabelle told him if he moved down to Los Angeles, she would do her best to help him live (R. 56).

In October of 1938, Edward Cebrian removed from Cuyama to Los Angeles County (R. 42, Plaintiff's Ex. 11). Thereafter, in and about November, 1938, defendant and her husband left Rancho Cuyama and moved to the Fairmont Hotel in San Francisco (R. 98-99). When defendant came to the Fairmont, Edward had already moved to Los Angeles (R. 41, 99).

For awhile, Edward's "first residence down there was with some friend that had a sort of guest house" (R. 100).

Then, on October 1, 1939, Edward rented an apartment at 1549 Northwestern Avenue in Los Angeles (Plaintiff's Ex. 10, R. 42). Edward told his landlady, Mrs. Melcher, that it was his intention to become a permanent tenant and to make the apartment his permanent home (R. 42). Upon rental, Edward promptly moved into this apartment and took in with him his bookcase, his books, his stamp collection, his pictures and his clothing, and he never left the premises until the date of his death on June 6, 1944 (Plaintiff's Ex. 10, R. 42).

While Edward was living in Mrs. Melcher's apartment house, he, on March 20, 1940, became a registered voter in Los Angeles County. Under oath Edward Cebrian said that he was a resident of Los Angeles County residing at 1549 Northwestern Avenue (Plaintiff's Ex. 11, R. 42-43).

After becoming a registered voter, Edward voted at Los Angeles in the general elections of 1940 and 1942 (Plaintiff's Ex. 11, R. 42).

Then on June 6, 1944, Edward died at Los Angeles. It is most clear that during the entire period of time commencing when Edward moved to Los Angeles until he died

there that he had never left the Los Angeles area (R. 42, 89, 100-101).

At the date of his death, Edward still had at his apartment his books and family paintings (R. 49). Defendant sold some of the books and brought the balance of the personal belongings from Los Angeles to San Francisco when she cleaned out the apartment (R. 49).

By statute, Government Code, Section 244, a residence: "is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose." There can be little doubt that Edward's apartment in Los Angeles meets that statutory definition.

There is some evidence that Edward was unhappy in Los Angeles and that he wanted to make his residence in San Francisco. But he never did so. Such evidence is found in recollections of letters and conversations in which Edward is reputed to have said the following:

> "* * * he was unhappy in Los Angeles and wanted to return to San Francisco." (R. 102);
>
> * * * * * * *
>
> "* * * he wanted to return to San Francisco and make his residence here." (R. 102); and
>
> * * * * * * *
>
> "* * * he wanted to make San Francisco his home." (R. 105).

His reputed desire to return to San Francisco and "to make" his residence here was ineffective to change his residence from Los Angeles to San Francisco. This, because "Residence can be changed only by the union of act and intent." (Government Code, Section 244 (g)). In the case at bar there was no act making San Francisco his residence. In fact, he had no place to go in San Francisco, his family

home having been sold and his relatives having been unable to find suitable quarters for him elsewhere.

In addition, the common law of California establishes Los Angeles residency. For example, in *Bullis v. Staniford* (1918), 178 Cal. 40, the Court discussed the question of residency in proceedings to set aside a fraudulently declared homestead. Staniford lived at Fresno. In 1912 he went to Los Angeles; he registered as a voter in Los Angeles; and he voted at all regular elections in that city. The Court pointed out that his registration was supported by affidavits solemnly alleging that his residence was in Los Angeles. He also testified in a court action that his residence was in that city. The Court disposed of contrary evidence similar to that in the case at bar as follows, p. 46:

> "* * * At most his testimony amounts to proof of a floating intention some day to return to Fresno to live, and this as against the solemn, undisputed evidence of facts establishing his residence in Los Angeles is negligible."

And *In Estate of Brady* (1918), 177 Cal. 537, states, p. 540:

> "* * * The presumption that a person is innocent of crime is very strong, and it is not to be assumed, in the absence of substantial evidence of the fact, that Brady committed perjury in making his affidavits of registration. The fact that his original place of residence was San Francisco is of no force to raise the presumption that it continued to be there after the year 1914, as against the positive evidence that in that year he deliberately changed it to the city of Ross."

Other cases to the same effect include:

Taff v. Goodman (1940), 41 C.A.2d 771, 775;
Estate of Weed (1898), 120 Cal. 634; and
Estate of Margaret Austin (1879), Myrick, pg. 237.

By Statute the Cebrian Estate Should Have Been Probated in Los Angeles County

It has been shown in a prior section of this brief that Edward Cebrian was a resident of the County of Los Angeles at the date of his death. The California statute (Probate Code, Section 301(1)) specifically provides that letters of administration "must be" granted and that administration of estates "must be" had in the Superior Court of the County in which the decedent was a resident at the time of his death.

The statute made it the duty of the defendant to probate the estate in Los Angeles and not to probate it in San Francisco. By her actions, defendant obtained probate of the estate in San Francisco rather than in Los Angeles.

Thus defendant has obtained custody of all of the assets of Edward Cebrian, whereas probate should have been lodged in an officer of the court in Los Angeles.

But can relief be awarded because of this factor?

Collateral Attack on Judgment Not Available as Remedy

The law in California is quite clear that plaintiff would not be justified in making a collateral attack upon the order granting letters in the absence of fraud in its procurement. The Probate Code, Section 302, provides:

> "302. * * * In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

And the cases, with unanimity, refuse to upset a probate judgment on the ground that it was wrongfully obtained. Examples of cases so holding include such authorities as:

Irwin v. Scriber (1861), 18 Cal. 499, 504;

Estate of Robinson (1942), 19 C.2nd 534;

Estate of Crisler (1948), 83 C.A. 2nd 431;
In re Griffith (1890), 84 Cal. 107; and
Holabird v. Superior Court (1929), 101 C.A. 49.

Therefore, if plaintiff had sought to set this prior decree aside, it is clear a roadblock would have been met at the outset. However, the circumstance that plaintiff would be unable to set this prior decree aside did not preclude the trial court from granting equitable relief.

The Court so said in *Bacon v. Bacon* (1907), 150 Cal. 477:

> "* * * a suit to review a judgment for fraud or mistake is a direct proceeding against such judgment and not a collateral attack" (150 Cal. 486).

We particularly note that the thing which cannot be collaterally attacked is the jurisdiction of the superior court and that the statute does not say that the place of residence shall not be contested in any other proceeding.

Equity Has Power to Grant Relief from Judgment

The power of a federal District Court sitting in equity to grant equitable relief against an otherwise binding probate judgment is well established.

In this Circuit, the earliest case appears to be *Patterson et al. v. Dickinson et al.* (C.C.A. 9, 1912), 193 F. 328. In that case, an heir brought an action to seek equitable relief from a probate judgment and, as in the case at bar, the District Court thought it was without power to grant the relief sought. In reversing the lower court and in overruling a demurrer, this Court said (pg. 333):

> "* * * We may concede that upon the allegations of the bill in this case the court below had no authority to set aside the decrees of the superior court of Los Angeles county in admitting the will to probate and distributing the estate, and such is not the object of the bill. It is to declare the appellee a trustee of the property which he

has inequitably obtained, and its jurisdiction to do so rests upon principles as old as equity itself."

Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, states, p. 717:

> "It is well settled that a court of the United States, in the exercise of its equity powers and where diversity of citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment or decree fraudulently obtained in a state court, as the decree of the federal court operates on the parties, and not on the state court. * * *"

Diamond v. Connolly (C.C.A. 9, 1918), 251 Fed. 234, 240-247, is in accord.

And in *Arrowsmith v. Gleason* (1889), 129 US 86, a minor, upon majority, brought an action in a state probate court to have proceedings instituted by his guardian set aside as being void. The Ohio state courts held that the proceedings complied with the provisions of the Ohio law and refused to annul the prior decree. This earlier decision is reported in *Arrowsmith v. Harmening,* 42 Ohio St. 254. This decision therefore became final. The plaintiff then commenced an independent action in the federal court for the northern district of Ohio. The federal court dismissed the action and on appeal from this latter decision the United States Supreme Court reversed. In reversing, it said, p. 101:

> "These principles control the present case which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction

> of the circuit court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

The foregoing cases parallel the California Civil Code, Section 2224:

> "2224. (Involuntary trust resulting from fraud, mistake, etc.) One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

One of the first expressions of the California rule is found in *Estate of Hudson* (1883), 63 Cal. 454. In that case, petitioners sought to have a decree of distribution and discharge set aside because of fraud and because the Court had been imposed upon by false testimony. The Court held that a probate court has no jurisdiction to entertain such a petition because the decree of final distribution was final. The Court then went on to say (page 457):

> "* * * In such cases, courts of equity have jurisdiction to afford proper relief; and if it be true that, by means of false testimony, the Probate Court was imposed upon, and induced to make a decree which it would not otherwise have made, doubtless a court of equity can charge the distributees as trustees."

From that beginning, equitable relief has been common in the California decisions where a final judgment has been

obtained through varying forms of fraud, accident, mistake or other wrongful act. Examples include the following:

Wickersham v. Comerford (1892), 96 Cal. 433, 439-440;

Curtis v. Schell (1900), 129 Cal. 208, 215;

Sohler v. Sohler (1902), 135 Cal. 323, 330-331;

Silva v. Santos (1903), 138 Cal. 536, 542;

Bacon v. Bacon (1907), 150 Cal. 477, 486-487;

Campbell-Kawannanakoa, et al. v. Campbell (1907), 152 Cal. 201, 208-209;

Estate of Walker (1911), 160 Cal. 547, 548-549;

Simonton et al. v. Los Angeles Trust & Savings Bank, et al. (1923), 192 Cal. 651, 655-658.

McGuinness v. Superior Court (1925), 196 Cal. 222, 230;

Caldwell v. Taylor (1933), 218 Cal. 471;

Walsh v. Majors (1935), 4 C.2d 384, 395-397;

Purinton v. Dyson (1937), 8 C.2d 322, 325-327;

Olivera v. Grace (1942), 19 C.2d 570, 575-576;

Larrabee v. Tracy (1943), 21 C.2d 645, 651;

Monk v. Morgan (1920), 49 Cal. App. 154, 159-163;

Kasparian v. Kasparian (1933), 132 Cal. App. 773;

Zaremba v. Woods (1936), 17 C.A. 2d 309, 318-319;

Estate of O'Dea (1939), 34 C.A. 2d 179, 181;

Cardozo v. Bank of America, etc. (1953), 116 C.A. 2d 833, 837-840.

Excellent review notes on the status of the California law on the entire subject are found in a comment, *Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud* (1934-1935), 23 Cal. Law Review 79; and a comment *Fraud: Relief in Equity Against Judgments Obtained by Fraud.* (1920-1921) 9 Cal. Law Review 156.

With this preliminary discussion, we turn to the view of the District Court that extrinsic fraud was here lacking.

Under California Law, a Fraudulent Intent Is Not an Essential Element to Impress a Trust.

It will be noted that the trial court was of the view that relief could not be granted because there was no showing of "fraud extrinsic in character" (R. 21). It will be observed that Civil Code Section 2224 does not except intrinsic fraud or constructive fraud from its operation.

Findings 13, 14, 15 and 20 (R. 26-28) and Conclusions IV and V (R. 30) in whole, or in part, are directed to defendant's intent. Specifications 2, 3, 4, 7, 8, 10 and 13 assert error in this regard. This section of the brief urges that intent to commit a fraud is not an essential element in a constructive trust case.

Quite recently, in *Cardozo v. Bank of America* (1953), 116 C.A. 2d 833, the trial court and the reviewing court both found an absence of intent or actual fraud (p. 837). Even so the reviewing court granted equitable relief because of constructive fraud in connection with a decree of distribution. The Court said, p. 837:

> "* * * Regardless of the reasons and of her lack of intent to defraud, her failure * * * (to give an heir notice of the probate proceedings) and her obtaining an undue advantage of him by her erroneous petition for distribution constituted a constructive fraud. As executrix it was her duty to notify him of the probate proceedings."

And at page 839, the Court said further:

> "* * * The fact that she did not intend to defraud him is not important. He was just as defrauded as if she had intended to defraud him."

Earlier, in a case involving Idaho law (which appears to be not unlike California law on this issue), this Court in *Diamond v. Connolly* (C.C.A. 9, 1921) 276 Fed. 87, said:

> "* * * Upon the evidence the Court below reached the conclusion that there was no fraud upon the part of the administrator, and gave judgment for the defendants." (p. 91).
>
> * * * * * * *
>
> "The learned judge seems from his opinion to have attached great importance to the testimony given on behalf of the defendants, to the effect that the administrator did not know and had never heard of the existence of Celia Diamond or Bridget McGrail prior to the entry of the decree of distribution." (p. 92).

Nevertheless, this Court granted equitable relief from the judgment because the plaintiffs had been deprived of their right to share in the proceeds of the estate.

Therefore, we conclude that the District Court committed error in finding that "extrinsic fraud" and intent are essential elements to an equitable action for relief from a judgment.

The Testimony of the Administratrix Warranted Relief

We believe that constructive fraud in the case at bar is established by the defendant's petition in probate. As shown, this petition states "of her own knowledge" that Edward "was a resident of the * * * County of Los Angeles * * * at the time of his death." (Plaintiff's Exhibit 13.) By statute, Probate Code, Section 1233, the probate court was required to receive this verified petition in evidence. The trial court did not find that the jurisdictional statement was true, but found only that it was "true and correct according to the

best information and belief of defendant." (Finding 15, R. 27). Our Penal Code Section 125 provides:

> "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false."

But even if this were not so, the admitted testimony of defendant given at the hearing was so deficient with respect to the jurisdictional facts that it was constructive fraud on the creditors and in a sense both intrinsic and extrinsic.

The sole testimony supporting the decree of the Superior Court is that of defendant. By her testimony, defendant was appointed administratrix of the estate. Further, defendant was a creditor of the estate and also was an heir of the decedent. As a consequence, she was in a position where she would be greatly benefitted if creditors were left unaware of their right to file claims. Irrespective of her good faith and honesty, defendant had a duty to see to it that all creditors of the estate received equal and proper notice of the probate proceedings.

California law leaves no doubt that an administrator is a fiduciary for the creditors of a decedent. This rule is announced in *Curtis v. Schell* (1900), 129 Cal. 208, where it was stated, page 215, that an executrix "is a trustee to protect the interests of creditors."

Other cases to the same effect include:

Magraw v. McGlynn (1864) 26 Cal. 420, 429;
Ex parte Smith (1878) 53 Cal. 204, 208; and
Estate of Palm (1945), 68 C.A. 2d 204, 211.

As a fiduciary, defendant had the statutory duty not to obtain any advantage over the creditors by "the slightest * * * concealment * * * of any kind." (Civil Code, Section

2228). Any advantage which she might have obtained by violation of the foregoing section is a constructive fraud against the creditors (California Civil Code, Section 2234.)

And this is true even if there be an absence of intent to defraud. *Estate of William Stott* (1877), 52 Cal. 403, 406; and *Cardozo v. Bank of America* (1953), 116 C.A. 2d 833, 837.

We examine the record and it clearly demonstrates that essential facts bearing on residency were concealed from the state court. The sum total of the evidence which defendant gave appears at pages 48 and 49 of the record. Its full analysis discloses the following deficiencies:

First, defendant testified that she "filed them in Los Angeles." This was accurate, but failed to specify that, in her petition, she stated under oath that Edward Cebrian was a resident of Los Angeles County.

Second, defendant testified that Edward was born in San Francisco and that his schooling centered in the Bay Area. This statement was accurate.

Third, defendant testified that Edward's family home was here. This statement inaccurately omits the critical fact that his family home was here until 1935, when it was bequeathed to Ralph Cebrian, or at the very latest until 1938, when Ralph Cebrian conveyed it out of the family.

Fourth, defendant testified that Edward "always" wanted to live here. This statement is inaccurate. The only times shown in this record that he wanted to live here were in 1938, before he made the move, and subsequently, after his residency had in fact been changed. In the interim he had told Mrs. Melcher that he wanted to live permanently in her apartment and he had sworn that his residence was in Los Angeles when he registered to vote.

Fifth, defendant testified that Edward would "always" come back home and that he was living "temporarily" in Los Angeles. This was inaccurate. The facts were that Edward Cebrian had not come back to San Francisco anytime during the period from 1938 to 1944.

Sixth, defendant testified that Edward was living in Los Angeles because "he was able to find a job in Los Angeles, whereas here he had not been able to find one". That was incomplete. The testimony shows that Edward moved to Los Angeles because defendant told him to move there and get away from his friends or she would no longer support him (R. 56, 102, 103).

Seventh, defendant failed to testify that when Edward moved to Los Angeles he took with him his only possessions —to-wit, his books and paintings and that those possessions were still in his apartment at the date of his death.

Eighth, defendant failed to testify that Edward Cebrian had registered in Los Angeles and had voted there in two general elections.

Ninth, defendant failed to testify that Edward's death certificate showed that his usual residence was in Los Angeles.

If all these facts had been pointed out to the Superior Court, it is a foregone conclusion that it would have held that residency in fact existed in Los Angeles County.

Since defendant did not testify as to all these facts, it necessarily follows that she obtained probate because of her incomplete testimony.

These factors establish either an extrinsic factor under the rule, or an exception to the extrinsic factor rule.

In *Laun v. Kipp* (1914), 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655, the applicable rule is stated as follows, 5 A.L.R. 670:

"* * * In ordinary situations one may, legally if not morally, keep silent and profit by his adversary's ignorance. That is neither fraud intrinsic, as in the case of perjury, nor fraud extrinsic, within the Throckmorton rule. But where there is a solemn duty to speak, independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of most serious nature, and, in a sense, both intrinsic and extrinsic."

This Court has applied the rule of the *Laun* case in *Hewitt v. Hewitt* (C.C.A. 9, 1927), 17 F.2d 716. There the widow of a decedent probated his estate without giving notice of the probate proceedings to an adopted child of the decedent. The petitions for probate and distribution made no reference that the decedent had an heir or that the heir ever existed. Plaintiff brought an action for equitable relief asking that defendants be declared trustees for his share of the estate. The District Court denied relief and on appeal this Court reversed with directions. The Court said:

"Here, by reason of the trust and confidential relation existing between the parties, a positive duty rested on the administratrix to fully advise the court as to all facts and all information in her possession concerning the heirs of the decedent and their whereabouts. This duty she wholly failed to discharge, and the reason for her failure cannot be accepted. * * *." (p. 717)

"* * * She made no inquiry for the adopted son, at his last known place of address or elsewhere, and maintained silence solely because of the hearsay statement made to her by her husband some years before. Had she communicated all of these facts to the court, it is not at all likely that a decree of distribution would have been entered without directing further investigation or

inquiry—at least we have a right to so presume. Nor will we speculate as to what might have happened, had she pursued the proper course." (p. 717)

"This case, we think, falls within the exception, and not within the general rule. Here the appellant was prevented from presenting a claim for his portion of the estate by the fraudulent conduct of the administratrix, and there has been no adversary trial or decision of any issue as between the parties to the present suit. The appellees frankly concede that, if the appellant had been prevented from making claim to the estate because of some fraudulent statement or misrepresentation on the part of the administratrix, a court of equity would readily grant relief; but it is contended that mere silence on her part presents an entirely different question. But there can be no sound distinction between the giving of false information and the failure to give correct information where the giving of the latter is a matter of legal duty. * * *". (p. 718)

And our California courts have applied the same rule in *Larrabee v. Tracy* (1943), 21 C.2d 645, 651 (quoting the rule from *Freeman on Judgments,* section 1235, volume 3, pp. 2575-2576); and *Wellman v. Security-First Nat. Bank* (1951), 108 C.A. 2d 254, 267. Cf. *Sohler v. Sohler* (1902), 135 Cal. 323, 327.

Jurisdictional Factor Is Extrinsic

Another exceptional factor which is extrinsic in the case at bar is that the question decided went to the jurisdiction of the court. If the court had known that Edward's residence was in Los Angeles—it is manifest that it would not, and could not, have assumed jurisdiction of Edward's estate.

For example in *Miller v. Higgins* (1910), 14 C.A. 156 there were two contemporaneous adoption proceedings.

Under the statutes, the first filed case created exclusive jurisdiction in that court. However, defendant conducted adoption proceedings in the second filed case without telling the court about the earlier proceeding. At page 162 the court said:

> "The record discloses that the fraud practiced upon the court making the order of adoption in this case was the concealment from the court of facts affecting its jurisdiction. It is unnecessary to cite authorities in support of the proposition that when a court competent to adjudicate upon the subject matter of the litigation obtains jurisdiction over the parties, within the territorial limits of its extent, such court alone has the power to adjudge upon the questions sought to be litigated in the suit, and no other court can deprive it of that power. The court finds, and it is most evident, that but for the concealment of the facts referred to it would not have made this decree of adoption in the first instance. Such concealment of facts affords ground for relief in equity. (1 Bigelow on Fraud, p. 92.) It is clear that the parties to the adoption proceedings concealed from the superior court the facts relative to the action of the superior court of Contra Costa county, and upon which facts the jurisdiction of the superior court of Los Angeles county depended. This was a fraud upon the court. (*Dunham v. Dunham,* 162 Ill. 589, (44 N.E. 841.))"

Relief was given in *McGuinness v. Superior Court* (1925), 196 Cal. 222, 230:

> "* * * It was also extrinsic fraud in so far as the court itself granting such decree was concerned since it was effected through concealment from the court in an ex parte proceeding of facts which the defendant in said action was bound to disclose and which if disclosed would have rendered improper the granting and impossible the procurement of such final decree."

Similarity in *State Ex Rel. Sparrenberger v. District Court* (1923), 66 Mont. 496, 214 Pac. 85, 33 A.L.R. 464, a husband obtained jurisdiction in a divorce proceeding by misrepresenting the residence of his wife. At 33 A.L.R. 466 the Court said:

> "Fraud being the arch enemy of equity, a judgment obtained through fraud practised in the very act of getting it will be set aside by a court of equity upon seasonable application. Indeed, the power of a court of equity to grant such relief is inherent. *Clark v. Clark,* 64 Mont. 386, 210 Pac. 93; 15 R.C.L. 760, 762. The conscience of the chancellor moves quickly to right the wrong, when it is shown that through imposition practised upon the court by a litigant an unfair advantage has been gained by him, and thus it has been made an instrument of injustice. 15 R.C.L. 761; *Dowell v. Goodwin,* 22 R.I. 287, 51 L.R.A. 873, 84 Am. St. Rep. 842, 47 Atl. 693."

Crow v. Crow (1914), 74 Okla. 455, 139 Pac. 122 is in accord.

The Ex Parte Nature of the Hearing Was Extrinsic

Another independent concept making the instant mistake or fraud extrinsic is the fact that it arose in an *ex parte* proceeding.

In the case at bar, there was no contest as to the fact of residency and it cannot be said realistically that the Court considered that there was a fact dispute. Defendant testified in favor of the San Francisco residency and there were present at the hearing only her sister and her attorney (Defendant's exhibit B, page 15). Here the factor making the judgment inequitable has taken place in a non-adversary proceeding. *Wolfsen v. Smyth,* (C.A. 9, 1955) 223 F.2d 111, 113.

The non-adversary nature of the present proceedings is emphasized by the fact that Judge Fitzpatrick heard 57 matters on February 26, 1945 and that the estate of Edward Cebrian was the 49th matter heard by him on that day (Plaintiff's exhibit 21A).

This Court, in *Hewitt v. Hewitt* (C.C.A. 9, 1927), 17 F.2d 716, said, p. 718:

> "* * * there has been no adversary trial or decision of any issue as between the parties to the present suit."

And in *Dunlap v. Steere* (1891), 92 Cal. 344, the Court said, quoting from other authority:

> "* * * In a case * * * where the proceeding is *in rem,* and the judgment is obtained without the knowledge of the defendant, and the proceedings are all necessarily *ex parte,* it would be hard indeed if this court could not interpose to protect a party against the fraud of the plaintiff. The propriety of this court's interferring in such cases is too obvious to require its vindication." (p. 348)

Later in *Kasparian v. Kasparian* (1933), 132 Cal. App. 773, the Court held, page 781:

> "* * * We think that under this definition the fraud here disclosed must be held to be extrinsic. It did not occur in the course of an adversary proceeding at which the plaintiff was either present or represented."

Accord:

> *Bacon v. Bacon* (1907), 150 Cal. 477, 492, and
> *Curtis v. Schell* (1900), 129 Cal. 208, 215.

Los Angeles Public Records Are an Extrinsic Factor

If we are to assume that a constructive trust requires "extrinsic factors", whether those factors be actual or con-

structive fraud, we find them present in the case at bar.

One factor is that the circumstances which a creditor would most logically follow gave clear record evidence that Edward's estate should have been probated in Los Angeles County, if it were probated at all.

First, Edward Cebrian had lived in Los Angeles continuously from 1938 to 1944 and had with him in Los Angeles his prized personal belongings (this brief, pages 23, 25 and 26).

Second, Edward made it a matter of public record in his voting registration affidavit that his residence was in Los Angeles (this brief, page 25).

Third, Edward's registration affidavit made it a matter of public record that he voted in two general elections in Los Angeles County.

Fourth, Edward's death certificate made it a matter of public record that his usual residence was in Los Angeles.

Fifth, defendant made it a matter of public record *under oath* in her petition in probate filed in Los Angeles County that Edward was a resident of Los Angeles County at the date of his death.

Sixth, there was no publication of notice to creditors in Los Angeles County advising them of the San Francisco proceedings.

Seventh, although the Los Angeles probate proceeding went "off calendar", there was nothing in the proceeding to indicate that probate was being conducted in San Francisco.

Eighth, in view of Edward's manifest poverty, a creditor would naturally believe that the petition had gone off calendar because of no assets rather than because of a co-pending probate proceeding in another county.

The foregoing are all matters of public record and since they occurred in a logical county, they are matters of which a creditor should have had constructive notice. It should not need citation of authority to support the logical conclusion that these matters of public record did not give any creditor either actual or constructive notice of anything which might occur in San Francisco, but that on the contrary, they gave effective notice that there could be no probate proceedings in any county other than Los Angeles County.

These undisputed facts are quite analogous to the situation in *Adams v. Hackensack Trust Co.* (1945), 156 Fla. 20, 22 So. 2d 392. The court had before it a situation in which the apparent residence of the deceased was in New York or in New Jersey and his real residence was in Florida. The estate was properly probated at Florida and proper statutory notice was given. The creditor corresponded with the administrator, and the latter, without mentioning where the estate was being probated, said that he would take care of the creditor's claim. The creditor did not learn of the Florida proceedings until after the time to present claims had expired. Although the specific acts are different than in the case at bar, the reasoning of the court with respect to notice and to the extrinsic factor contrary to a logical deduction is applicable to the instant case. The court said pp. 395-396:

> "* * * The deceased had a home in New York, one in New Jersey and one in Florida. In the mortgage held by the plaintiff the deceased stated his residence to be in the State of New Jersey. One of the executors told the Trust Officer that deceased died in his (deceased) home in the State of New York but withheld any information to the effect that the will was probated in the State of Florida. This was calculated to mislead the claimant and to cause it to reasonably assume that the

administration of the estate would be either in New Jersey, where the mortgage showed his residence to be, or else in the State of New York, where he died."

* * * * * * *

"* * * In withholding information which was contrary a logical deduction to be drawn from the information given, a fraud was committed which was calculated to mislead, and which did result in misleading, the claimant. It was the perpetration of this fraud and misconduct which opened the portals of a court of equity for the granting of the relief sought."

The same legal principal is applied in *Monk v. Morgan* (1920), 49 Cal. App. 154. In that case it had been the decedent's habit to give certain of his heirs who lived outside California a monthly allowance. Upon the death of the decedent, the executrix filed probate proceedings and gave notice according to statutory rules. However, she gave no notice of the decedent's death to the non-resident heirs and continued to give those non-resident heirs the same monthly allowance that decedent had given them. After the estate was closed the heirs learned for the first time that the decedent had died and brought an action to enforce a constructive trust. The Court held that equitable relief was appropriate.

Accordingly plaintiff submits respectfully that defendant's silence as to material facts, either with or without fraudulent intent, warrants equitable relief.

The Caledonia Farms Arrangement Was an Additional Extrinsic Factor.

Another extrinsic factor is found in the fact that defendant did not make of record a substantial asset of decedent until long after the time provided by statute so to do.

In 1918 or 1919 John Cebrian bought Caledonia Farms (R. 73), a large tract of land in Yolo County (R. 59). In 1930, John Cebrian made a present of it to Edward and Ralph Cebrian (R. 73).

On August 21, 1934, when he filed his farmer-debtor proceedings, Edward was still a one-half owner of Caledonia Farms. His petition valued his one-half interest at $55,000 and listed liens against the premises in the total amount of $17,433.41 (Plaintiff's Exhibits 22-F, 22-B and 22-C). This gave Edward a net equity at that time of $37,566.59.

For a while Edward tried to sell his half interest for $50,000 gross (R. 109), but he was unable to negotiate a sale. In the meantime, Ralph "thought we ought to keep it in the family" (R. 59). Ralph and Edward talked it over and decided that if the sisters would take it over and pay the taxes "then we would be glad to deed it over to them" (R. 59).

Edward deeded his half share to defendant on March 21, 1935 (Plaintiff's exhibit 7, R. 39). Defendant had the property in trust for Edward (Defendant's exhibit B, page 20). Defendant could not take care of it and she deeded it to her sister Josephine C. McCormick on October 30, 1935 (Plaintiff's exhibit 8, R. 40).

After Edward had deeded his interest in the property, Hugh J. Welden, the attorney for John S. Barbee, advised the attorneys for Van Meter-Terrell Feed Company, as of November 11, 1935, as follows:

> "* * * I understand all his (Edward's) resources to be involved in this ranch property, this would mean that collection of anything on the note would be extremely problematical." (Plaintiff's exhibit 26).

Then in March or April of 1938 Edward lost his rights in Cuyama Ranch (R. 59, 98). During this period, the attor-

neys for Van Meter-Terrell Feed Company wrote to Mr. Welden and asked him what the situation was as of March 22, 1938, calling his attention to the earlier investigation of 1935 (Plaintiff's exhibit 26).

Mr. Welden responded on March 30, 1938, that:

> "This (that maybe you could find some assets at some later date) is doubtful, and my investigation at the time indicated that Mr. Cebrian had nothing of any importance outside of the ranch." (Plaintiff's exhibit 26).

In the interim, Josephine C. McCormick was holding Caledonia Farms in secret trust for Edward and had intermingled Caledonia Farms with her own personal property in her income tax returns (Defendant's exhibits D-1 to D-4; R. 63). Defendant and Mrs. McCormick both recognized Edward's continuing interest in Caledonia Farms during this period by filing and payment of claims for past taxes covering this period (R. 64).

Then in 1940, after Edward was well settled in Los Angeles, Mrs. McCormick began to file independent returns of income for that property (R. 63), but Edward's interest still was not made a matter of public record.

This condition continued until Edward's death in 1944. In 1944 after Edward died Mrs. McCormick disclosed to her brother Ralph Cebrian and her sister Mrs. Koch that she had set up this trust (R. 62, 63).

At the date of death, this asset had a value of $112,500 (R. 114). But no mention of that fact was made in either the Los Angeles or the San Francisco petition (Plaintiff's Exhibits 13 and 21). And Probate Code Section 440(3) states that a petition "must state" among other things "The character and estimated value of the property of the estate."

The Probate Code provides further, sec. 600, that the administrator "must file with the clerk of the court an inven-

tory and appraisement of the estate of the decedent which has come to his possession or knowledge", and this "within three months after his appointment, or within such further time as the court or judge for reasonable cause may allow."

The three month period expired on May 26, 1945, but defendant waited almost 3 years until April 1, 1948 to file the inventory (R. 114).

Thereafter, on November 12, 1948, Mrs. McCormick transferred record title to Caledonia Farms to the estate and on April 8, 1949 she deeded the property to the heirs of Edward Cebrian (Plaintiff's exhibits 15 and 16, R. 43-44).

Thus, from March, 1935 to November, 1948, the Yolo County records failed to disclose that Edward in fact had any estate in Caledonia Farms; the San Francisco records failed to disclose it until long after the time to file creditors' claims had expired; and the Los Angeles records never disclosed it.

As a fiduciary, defendant should have made every effort to call this asset to the attention of creditors rather than to maintain silence until it was too late to file claims and rather than to make this asset a matter of public record in a county in which Edward had not resided for at least 8 years. And this is true regardless of fraudulent intent.

Plaintiff Did Not Have Constructive Notice of the San Francisco Proceedings.

Because defendant published notice of hearing her petition and notice to creditors in the San Francisco paper, the District Court concluded that plaintiff and her predecessors in interest had constructive notice of the San Francisco proceedings (Finding 12, R. 25; Conclusion II, R. 29). Specifications 5 and 6 assert error in this regard. Plaintiff contends that this was error in three independent respects.

In the *first* place, as a matter of law, constructive notice does not bar an equitable action. This principle is applied in *Bergin v. Haight* (1893), 99 Cal. 52. In that case, an administrator, through a straw man, improperly purchased an asset of an estate and one of the heirs at law brought an action to quiet title as against this asset. Defendant alleged that the proceedings complied with the statutes and the Court agreed, p. 55, that the Probate Court had jurisdiction to order and confirm the sale. After pointing out that the instant action was not a collateral attack but was a direct attack, the Court disposed of the constructive notice question, p. 56, as follows:

> "* * * The plaintiff had only constructive notice of the administration and proceedings to sell."

Dunlap v. Steere (1891), 92 Cal. 344, quoting from authorities of other states with approval, is in accord:

> "* * * the rule of the cases cited cannot be applied in all of its strictness to a case where the defendant has been brought in by newspaper notice only, and had no actual notice of the suit, and, as a consequence, had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application." (p. 349).

Therefore, California law requires more than constructive notice as a defense to the instant form of action.

In the *second* place, under the California statutes it would be clear that a creditor would have constructive notice of Los Angeles proceedings because the public records showed that to be his residence. But the statutory language would not appear to give any notice of San Francisco proceedings. Certainly, constructive notice can be no stronger than the actual facts upon which it is based. The logic of this posi-

tion is set forth in *Beckett v. Selover* (1857), 7 Cal. 215, pp. 236-237:

> "* * * it is the object of the law, that administration should never be granted until the death of the person, and then only one administration within the State. The law is compelled to adopt some rule for determining where this grant shall be made; and as the deceased could not have been a resident of two or more counties at the same time, the law makes his residence, at the time of his death, the test by which to determine the place where the grant should be made. * * * The heirs and creditors are bound to know *when* and *where* the deceased died; and they are presumed in law to know this, as they are the parties interested in the estate. When, therefore, the death has occurred, and the Probate Court of the proper county gives proper notice, the heirs and creditors are bound to know the proceedings. But parties interested are not bound to know anything of the proceedings of a Court that has no jurisdiction, because the facts giving jurisdiction do not exist. The persons interested cannot be required to watch the proceedings of all the Probate Courts of the State, at all times."

Indeed, in the *Beckett* case the court went so far as to hold that absence of jurisdictional facts voided the judgment on collateral attack. Although the *Beckett* decision was later overruled on this specific collateral attack point in *Irwin v. Scriber* (1861), 18 Cal. 499 at page 504, the *Beckett* case continues to be considered the law in constructive trust cases as illustrated by *Wingerter v. Wingerter* (1886), 71 Cal. 105, at pp. 110-111.

And in the *third* place, there was no constructive notice of the San Francisco proceedings, irrespective of the other foregoing elements, because the creditor was not in California at the time the notices were published.

Baylor Van Meter was the sole owner of the Van Meter-Terrell Feed Company, a Kentucky corporation, and he died at Lexington, Kentucky on June 6, 1945 (Finding 7, R. 24). But the notice to creditors had been published between February 27, 1945 and March 28, 1945 (Defendant's exhibit C). There is no evidence that Baylor Van Meter was in California while the notices were under publication. "That which does not appear to exist is to be regarded as if it did not exist." Civil Code, sec. 3530.

The rule negating constructive notice under the foregoing circumstances is stated in *Sterling v. Title Ins. & Trust Co.* (1942), 53 C.A. 2d 736 at page 749, as follows:

> "* * * A nonresident creditor who learns of the death within this state of his debtor may stand upon his right to present his claim at any time before distribution, unless he has actual notice of the fact of which creditors in the state have constructive notice by the publication and is not obliged to inquire whether notice to creditors has been given nor as to a limitation of time prescribed thereby, and if he is under no duty to make such inquiry the law charges him with no notice of facts which would have come to him through an inquiry."

Plaintiff therefore submits that the court was in error in concluding that there was constructive notice of the San Francisco proceedings.

The District Court Erred in Deciding Causal Relation.

Plaintiff introduced no evidence establishing that a claim would in fact have been filed if the defendant had pursued a proper course. As a consequence, the District Court concluded that "no acts of defendant have deprived plaintiff, or her predecessors, of their right to file claims" (Finding 16, R. 27-28). Specification 9 urges error in this regard.

By way of review, the indisputable evidence discloses that defendant was a fiduciary; that probate was had in San Francisco solely by virtue of the testimony of defendant; that defendant and her brother and sister were creditors of the estate; that defendant and her brother and sister were heirs of the decedent and that they obtained the property of the decedent free from any claim of any outsider.

The record is equally clear that no outside creditor of the decedent filed any claim against the estate and that the debt due to plaintiff's predecessors has been unpaid.

We cannot predict what Baylor Van Meter would have done if proper notice had been given because he died shortly after the time when such notice would have been published.

We submit that there is a causal relationship between defendant's benefit and plaintiff's injury as a matter of law. The legislature wisely determined that the estate of a decedent "must be" probated in the county of his residence and that notice to creditors "must be" published for four consecutive weeks in "the county" (Probate Code, sections 301(1), 700 and 701).

And when "the Probate Court of the proper county gives proper notice the heirs and creditors are bound to know the proceedings." *Beckett v. Selover* (1857), 7 Cal. 215, 237.

The law presumes that "a person takes ordinary care of his own concerns" (Code of Civil Procedure, sec. 1963, para. 4). Since there is no evidence that creditors would not have complied with the requirements of Probate Code, section 707 if proper notice had been given, the statutory presumption establishes the causal relationship between defendant's acts and the results in this case.

But beyond that, we submit that the beneficiary of a fiduciary relationship is not required to prove a causal relation-

ship between the benefit to the fiduciary and the injury to the cestui.

Olivera v. Grace (1942), 19 C.2d 570, 578 states:

> "Finally, it is suggested by the defendant that the complaint fails to state a cause of action because it does not allege that a different result would have been reached if the interests of the incompetent had been properly protected. It is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case. (3 Freeman, supra, p. 2465, et seq.; 5 Pomeroy, supra, p. 4701; 15 Cal. Jur. 29.) The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. (Cf. McArdle Real Estate Co. v. McGowan, 109 N.J. L. 595 (163 Atl. 24).) It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding."

In *United States v. Carter* (1910), 217 U.S. 286, the Court discussed a secret profit which a fiduciary had realized on a contract involving his principal. During its opinion, the Court laid down this rule, p. 305:

> "* * * It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, 'You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct.' Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency."

In *Hewitt v. Hewitt* (C.C.A. 9, 1927), 17 F.2d 716, 717, it is said:

> "* * * Nor will we speculate as to what might have happened, had she pursued the proper course."

Plaintiff submits, therefore, that the District Court erred in concluding that the acts of defendant did not deprive plaintiff and her predecessors of their rights to file a claim against the estate.

The Action Is Not Barred for Failure to File a Claim in the Probate Proceedings.

The District Court found that "no claim was ever filed or presented by plaintiff or anyone else upon the promissory note of Edward Cebrian * * * as required by the Probate Code of California" (Finding 17, R. 28) and concluded that any "suit or action to recover upon the promissory note * * * is forever barred" (Conclusion of Law I, R. 29). Specification 12 urges error in this conclusion.

It has been shown that the publication of notice to creditors in San Francisco, rather than in Los Angeles where it should have been published, was brought about through defendant's conduct. No reason in law or in logic requires that conduct in this respect be treated any differently than other conduct resulting in the loss of a litigant's rights.

That there is no distinction in logic appears from *Adams v. Hackensack Trust Co.* (1945), 156 Fla. 20, 22 So. 2d 392. That case, discussed above in this brief pp. 44-45, involved a situation in which the fiduciary withheld information where the estate was being probated. In that case, as in this case, the creditor did not learn where the estate was being probated and no claim was filed within the statutory period of time. The court decreed a constructive trust. True in that

case, a claim was filed after the statutory period of time but, since tardy filing could have no legal effect, that difference is not believed to create a distinction between the cases.

The same result should obtain in this state. For example, in *Stanley et al v. Westover* (1928), 93 Cal. App. 97 the court, in an action not even involving constructive fraud, directed the entry of judgment in equity in favor of a creditor as against the heirs of an estate and ordered the debt to be a lien on certain property involved in the controversy. At page 110, the court said:

> "The failure of Westover to present his claim against the estate of Fanny L. Stanley did not operate as an extinguishment of the debt."

Further, it has also been shown that at the time that the notice to creditors was published in February and March of 1945 the creditor was a resident of the state of Kentucky and that he died shortly after the completion of publication and within the six months period to file claims.

In *Sterling v. Title Ins. & Trust Co.* (1942), 53 Cal. App. 2d 736 the court said, p. 749:

> "* * * A nonresident creditor who learns of the death within this state of his debtor may stand upon his right to present his claim at any time before distribution, unless he has actual notice" of the proceedings.

We therefore urge error in the determination of the trial court that the instant action is barred by failure to file a creditor's claim.

The Cebrian Note Did Not Provide Simple Interest

The Court found that the note in question provided for simple interest (Finding 10, R. 25). Plaintiff submits that this is in error (Question 5, Specification 18).

The note provides in part as follows:

> "Six Months After Date, * * * I promise to pay * * * the sum of $10,276.92 with interest at the rate of six per cent per annum from date until paid, without defalcation, interest payable at maturity and thereafter semi-annually until paid in full * * *." (Finding 5, R. 23)

This language specifically provides that principal with interest are due at maturity and that interest is payable thereafter semi-annually *until paid in full.* Arithmetically, if one computes the interest in accordance with this language, making the semi-annual rests as recited in the agreement, one cannot fail to compute compound interest.

The specific language of the note in suit has not been specifically construed in any reported California decision which the plaintiff has been able to find. But general language in 33 CJ 207, Interest, Section 66, note 84, recites:

> "But where there is an agreement for the payment of interest periodically after the maturity of the principal debt as well as before, interest will be allowed on installments of interest falling due after maturity of the principal and unpaid."

The foregoing language is brought down to date in 47 CJS 26, Interest, Section 15, Note 16. The note cites *Ashford v. Traylor* (1931), 43 Ga. App. 507, 159 S.E. 777. There the court said that where a note "* * * contained a stipulation that it should continue to bear interest from date, payable semi-annually, at the rate of 8 per cent. per annum, until paid, there is manifested an expressed intent to vary the general rule that accrued interest should not bear interest subsequent to the maturity of the principal obligation."

Plaintiff therefore concludes respectfully that the District Court erred in determining that the language provided

simple interest. It is submitted that interest should be compounded in accordance with the expressed intent of the note.

The Disputed Findings Do Not Support the Judgment.

Prior sections of this brief urge that the specific findings do not support the judgment because the absence of intent to defraud and the absence of proof of causation are not essential elements to an equitable action of this type. This section urges that even if they be deemed essential elements, the findings of fact are clearly erroneous on the issues presented for review.

Finding 13 determines that defendant's "only reason" for filing a Los Angeles petition was "to avoid delay" and that defendant could and would have proceeded with the Los Angeles proceedings "solely" to meet the contingency that the San Francisco Superior Court might decide that Edward was a resident of Los Angeles. Findings 14 and 15 determine that defendant's acts were not fraudulent (R. 27). Finding 15 states that the allegations of the San Francisco petition "were true and correct according to the best information and belief of defendant" (R. 27). Finding 20 finds an absence of fraudulent intent (R. 28). Specifications 2, 3, 4, 8, and 10 are directed to these findings.

Since all the foregoing findings are interrelated and since the same evidence pertains to each of them, we discuss them as a group. The only evidence in the entire record bearing upon defendant's intent are her deeds and her oral testimony taken on deposition (defendant's exhibit B). There is no question of credibility of witnesses because defendant did not testify in open court.

In the first place, the cold facts negate finding 13. Edward Cebrian died on June 6, 1944 (Finding 9, R. 25); the San Francisco proceedings were filed on February 10, 1945

(Finding 12, R. 25), 8 months and 4 days later; the Los Angeles proceedings were filed on February 20, 1945 (Finding 13, R. 26), 10 days after the San Francisco proceedings were filed; and a decision was reached in the San Francisco proceedings on February 26, 1945 (Finding 13, R. 27), only 6 days after the Los Angeles proceedings were filed. As a consequence if the San Francisco decision had gone against the petitioner, there could have been a delay of only 6 days in filing the Los Angeles proceedings. Certainly when the institution of any probate proceedings was delayed a period of 8 months and 4 days, the prevention of a possible delay of 6 days in filing proper proceedings could not have been a motivated factor for the dual procedure.

Furthermore, this explanation is not supported by any oral testimony whatsoever. We have examined the deposition of defendant from cover to cover (defendant's exhibit B) and find no evidence that the question of delay was the sole purpose for the two proceedings.

Defendant's only stated reason for the two petitions is as follows, defendant's exhibit B, page 15:

> "* * * I filed the two petitions, because I did not know what the law would claim would be his residence."

This reason would not justify either of her petitions because each one of her petitions without qualification states of her own knowledge that Edward Cebrian's residence was in a different place.

Indeed defendant gave no explanation whatsoever justifying two completely opposite oaths on the same matter and on the same day. The two jurisdictional statements set out in full at page 7 of this brief can not be reconciled. One or the other of these two oaths had to be false. This, because "there can only be one residence." Government Code, Section 244 (b).

Defendant made no effort to justify the San Francisco oath other than the following, defendant's exhibit B, page 16:

> "Q. (By Mr. Sooy) Mrs. Koch, was there an allegation or statement in the petition for letters of administration that you filed in San Francisco that was false or untrue?
>
> A. No, I should say not."

Defendant justified her Los Angeles oath as follows, defendant's exhibit B, page 23:

> "Well, he was living there. Doesn't that mean he was a resident? That's the way I took it, that he was living there."

We believe that her Los Angeles oath was the correct one. It is patent that her explanation of the Los Angeles oath would not justify her conflicting San Francisco oath.

Furthermore, defendant was the informant on Edward Cebrian's death certificate and this certificate stated that "the usual residence" of Edward Cebrian was in Los Angeles (plaintiff's exhibit 12). The Health and Safety Code, section 10,375, requires that the certificate of death must contain the "usual residence" of the decedent and the "informant." A death certificate is *prima facie* proof of its contents. *Estate of Lenci* (1930), 106 Cal. App. 171, 175.

It is a misdemeanor to furnish false information affecting any certificate or record. Health and Safety Code, Section 10675. And any facts not correctly stated could have been changed by affidavit. Health and Safety Code, Section 10,575.

If we test the allegations of the petition, the state of her knowledge at the time the allegations were made, and her testimony, we find that the San Francisco allegations were

false as a matter of law. The Penal Code, section 125 states "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." The foregoing language applies to pleadings. *People v. Agnew* (1947), 77 Cal. App. 2d 748, 753. The scope of perjury statutes extends to petitions for letters of administration. *Cowan v. State* (1916), 15 Ala. App. 87, 72 So. 578, 579.

Since defendant's acts were unlawful, the law presumes that "an unlawful act was done with an unlawful intent." Code of Civil Procedure, Section 1963, Para. 2.

Finally, specifications 17 and 18 allege error with respect to findings 18 and 19 (R. 28). These findings recite as follows:

> "18. That all of the facts alleged in plaintiff's Complaint inconsistent with the foregoing findings are untrue;"
>
> "19. That all the facts alleged in defendant's Answer not inconsistent with the foregoing findings are true;"

We submit that these findings do not comply with Rule 52 of the Federal Rules of Civil Procedure and that they should be stricken. Rule 52 (a) says:

> "* * * the court shall find the facts specially * * *"

We have found no authority either approving or disapproving such generalized findings but we submit respectfully that such broad language does not come within the language of Rule 52.

We submit, in summary, that the findings bearing on the elements of motive and intent are clearly erroneous, even if it were deemed that such elements were material to plaintiff's case.

The District Court on Remand Should Determine Laches and Limitations

The District Court did not pass upon the applicability of the statute of limitations or the defense of laches (R. 21, Conclusion VI, R. 30-31) because of its specific finding on the issue of fraud (R. 21). It would appear to be proper, therefore, for the District Court on remand to consider these defenses and any other special defense based upon laches and various statutes of limitations (Conclusion VI, R. 30-31).

CONCLUSION

In conclusion we submit that the District Court erred in concluding that plaintiff is not entitled by law or under the evidence adduced under the trial of this case to a judgment that defendant is a constructive trustee for plaintiff; that it erred in concluding that defendant is entitled to a judgment that plaintiff take nothing by her complaint; and that it erred in failing to enter judgment for plaintiff in accordance with the prayer for relief and in failing to enter findings and conclusions of law consistent with said prayer for relief (specifications 13, 14, and 15).

We submit most respectfully that a creditor is entitled to a judgment declaring an administratrix to be a constructive trustee where the record, as here, shows the following:

1) that the administratrix has sufficient assets on hand to pay the claim;

2) that the administratrix has no defense to the merits of the claim;

3) that the administratrix procured probate of the estate of the decedent and published notices to creditors of the decedent in a county where the Superior Court in fact had no real or apparent jurisdiction;

4) that the administratrix procured such administration by her own testimony and her own verified petition;

5) that the testimony of the administratrix was incomplete in speaking of the jurisdictional facts from which residence is determinable;

6) that the administratrix had a conflicting self interest as a creditor and heir of the decedent;

7) that the administratrix made it a matter of public record by death certificate and by another verified petition that the decedent was a resident of a county other than the one in which actual probate was lodged;

8) that the decedent himself made it a matter of public record by his sworn affidavits for voting registration that he was a resident of a county other than the one in which actual probate was lodged;

9) that the creditor was a nonresident of the state of California at the time the notice to creditors was published;

10) that the administratrix did not make the existence of the assets of the decedent a matter of public record for a period of almost 3 years after she was required by law to file her inventory and appraisement; and

11) that the administratrix and her brother and sister were the only persons to share in the decedent's estate, either as heirs or creditors.

Plaintiff submits that the foregoing facts appear without controversy in this record and that the California authorities and analogous authorities from other states warrant the relief sought. Even if there were no actual intent to defraud any creditor, we submit that the evidence establishes constructive fraud sufficient to require restitution.

Respectfully submitted,

Carl Hoppe
Attorney for Plaintiff

(Appendix Follows)

APPENDIX

Excerpts from Statutes and Rules in Argument.

United States Code, Title 28, Section 1291:

"Final decisions of district courts. The courts of appeals shall have jurisdiction of appeals from final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

United States Code, Title 28, Section 1332:

"Diversity of citizenship; amount in controversy (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: * * * (2) Citizens of a State, and foreign states or citizens or subjects thereof; * * *

Federal Rules of Civil Procedure, Rule 52(a):

"Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Civil Code, Section 2224:

"[Involuntary trust resulting from fraud, mistake, etc.] One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Civil Code, Section 2228:

"Trustee's obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

Civil Code, Section 2234:

"Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

Civil Code, Section 3530:

"That which does not appear to exist is to be regarded as if it did not exist."

Code of Civil Procedure, Section 1963:

"(Disputable presumptions.) All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 2. That an unlawful act was done with an unlawful intent; * * * 4. That a person takes ordinary care of his own concerns;"

Government Code, Section 244:

"Same: Determination of place. In determining the place of residence the following rules are to be observed: (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (b) There can only be one residence. (c) A residence can not be lost until another is gained. * * * (g) The residence can be changed only by the union of act and intent."

Health and Safety Code, Section 10,375:

"Form and contents. The certificate of death shall be divided into two sections, the first section shall contain those items necessary to establish the fact of death and the second section shall contain those items relating to medical and health data; the first section shall contain the following items and such other items as the state department may designate: (1) Personal data concerning decedent: (a) Full name. (f) Date of birth and age at death. (g) Birthplace. (h) Usual residence. (i) Occupation and industry or business. (2) Date of death, including month, day and year. (3) Place or occurrence of death. * * * (5) Informant."

Health and Safety Code, Section 10,575:

"Affidavit of existence of error: Supporting affidavit. Whenever the facts are not correctly stated in any certificate of birth, death, or marriage, already registered, the local registrar shall require an affidavit under oath to be made by the person asserting that the error exists, stating the changes necessary to make the record correct, and supported by the affidavit of one other credible person having knowledge of the facts."

Health and Safety Code, Section 10,675:

"Failure or refusal to furnish correct information: False information. Every person who * * * furnishes false information affecting any certificate or record, required by this division is guilty of a misdemeanor."

Penal Code, Section 125:

"Statement of that which one does not know to be true. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false."

Probate Code, Section 301:

"Jurisdiction of proceedings: (Court: County: Nonresident decedents). Wills must be proved, and letters testamentary or of administration granted and administration of estates of decedents had, in the superior court: (1) Of the county of which the decedent was a resident at the time of his death, wherever he may have died; (2) Of the county in which the decedent died, leaving estate therein, he not being a resident of the state; (3) Of any county in which he leaves estate, the decedent not being a resident of the state at the time of his death, and having died out of the state or without leaving estate in the county in which he died; in either of which cases, when the estate is in more than one county, the superior court of the county in which a petition for letters testamentary or of administration is first filed has exclusive jurisdiction of the administration of the estate."

Probate Code, Section 302:

"Conclusiveness of order granting letters: Exception: [Collateral attack]. In the absense of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

Probate Code, Section 440:

"Contents of petition: [Formal requisites: Filing: Defects as affecting order or preceedings]. A petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, and must state:

(1) The jurisdictional facts;

(2) The names, ages and post-office addresses of the heirs of the decedent, so far as known to the applicant;

(3) The character and estimated value of the property of the estate.

No defect of form or in the statement of jurisdictional facts actually existing shall make void an order appointing an administrator or any of the subsequent proceedings."

Probate Code, Section 441:

"Procedure before hearing: [Notice: Posting: Contents: Mailing to heirs]. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause similar notice to be mailed, postage prepaid, to the heirs of the decedent named in the petition, at least ten days before the hearing, addressed to them at their respective post-office addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending."

Probate Code, Section 600:

"[Filing inventory and appraisement: Time: Transmittal of copy to assessor: Form and contents:] When appraisement unnecessary. Within three months after his appointment or within such further time as the court or judge for reasonable cause may allow, the executor or administrator must file with the clerk of the court an inventory and appraisement of the estate of the decedent which has come to his possession or knowledge together with a copy of the same which copy shall be transmitted by said clerk to the county assessor. The inventory must include the homestead, if any, and all the estate of the decedent, real and personal, particularly specifying all debts, bonds, mortgages, deeds of trust, notes and other securities for the pay-

ment of money belonging to the decedent, with the name of each debtor, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and a statement of the interest of the decedent in any partnership of which he was a member, to be appraised as a single item. It must include an account of all moneys belonging to the decedent. If the whole estate consists of money in the hands of the executor or administrator, there need not be an appraisement, but an inventory must be made and returned as in other cases."

Probate Code, Section 700:

"Publication of notice to creditors [to file or present claims: Duty of representative]. The executor or administrator, promptly after letters are issued, must cause to be published in some newspaper published in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against the decedent to file them, with the necessary vouchers, in the office of the clerk of the court from which letters issued, or to present them, with the necessary vouchers, to the executor or administrator, at his residence or place of business, to be specified in the notice, within six months after the first publication of the notice."

Probate Code, Section 701:

"Time of publication: [Neglect of representative to give notice: Death, etc., of representative as affecting time for filing claims]. Such notice must be published not less than once a week for four weeks."

Probate Code, Section 707:

"Claims on contract [and for] funeral expenses: [Necessity for filing or presentation: Time: Failure to

file as bar: Absence from state: Entry by clerk.] All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses, must be filed or presented within the time limited in the notice or as extended by the provisions of section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the state, in which event it may be filed or presented at any time before a decree of distribution is rendered. The clerk must enter in the register every claim filed giving the name of the claimant, the amount and character of the claim, the rate of interest, if any, and the date of filing."

Probate Code, Section 1233:

"Part II of C.C.P. applicable: [Affidavit or verified petition as evidence]. Except as otherwise provided by this code, the provisions of Part 2 of the Code of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to trials, new trials, appeals, records on appeal, and all other matters of procedure.

An affidavit or verified petition must be received as evidence when offered in any uncontested probate proceedings, including proceedings relating to the administration of estates of decedents and proceedings relating to the administration of estates of minors or incompetent persons after a guardian has been appointed therein and in uncontested proceedings to establish a record of birth."